No. 4095

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE BLUM-O'NEILL COMPANY, a Corporation,
Plaintiff in Error

vs.

F. J. SULLIVAN, *Defendant in Error*

Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division

Brief of Plaintiff in Error

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STATEMENT OF THE CASE

For the sake of convenience, the parties will be designated in this brief plaintiff and defendant, as they were in the trial court.

This is an action for damages for personal injuries alleged to have been sustained on the 4th day of May, 1922, by plaintiff while employed by and working for defendant. The pleadings and evidence of plaintiff and the undisputed evidence of defendant disclose the following alleged facts:

The defendant is and was at all times mentioned in the complaint a corporation engaged in the mercantile business in Cordova, Alaska. It owned and operated a general merchandise store and warehouse at that place. At its store it conducted a regular retail business and used its warehouse to store goods, wares and merchandise, and occasionally sold goods in larger quantities from its warehouse. (Tr. 92.) During all of said time H. I. O'Neill was its vice president and manager and Fred Frederickson its warehouseman. (Tr. 30, 31, 90.) Frederickson's duties were to check the freight as it was delivered into the warehouse, and to check the groceries and other merchandise as they were delivered on orders from the store and occasional customers; to care for the warehouse and the fires in its furnace so as to keep the proper temperature in the building for the goods, wares and merchandise stored therein; to prepare and put up orders given him to fill. (Tr. 91 and 110.)

The plaintiff was a delivery man for defendant during all the times mentioned in the complaint. As such delivery man it was his duty to deliver goods, wares and merchandise from defendant's store and warehouse to its various customers, and also to deliver goods, wares and merchandise from the warehouse to the store when it became necessary to replenish the stock in the store. (Tr. 92, 94 and 95.) Frederickson had no authority over plaintiff or other employees. (Tr. 93 and 94.) Plaintiff was an experienced delivery man and was familiar with the condition of the streets in Cordova at the time of the accident. (Tr. 43.) He was hired by H. I. O'Neill, vice president and manager of the company. (Tr. 43.)

On the 4th day of May, 1922, plaintiff drove the defendant's horse and delivery wagon to the warehouse for the purpose of conveying a load of groceries from the warehouse to the Carlisle Packing Company at the ocean dock in Cordova. Frederickson assisted plaintiff in loading the wagon. After the wagon was loaded, and plaintiff had driven a short distance from the warehouse, Frederickson called to him to stop, as he (Frederickson) wished to and did, over the protest of plaintiff, put four cases of milk and three cases of butter on the

footboard of the wagon that plaintiff was driving (Tr. 35), and plaintiff placed them on the seat. (Tr. 62.) The horse started to go, and plaintiff grabbed the lines with one hand and put the other hand on the cases of milk; a case of milk slid off and hit the horse and the wagon dropped into a hole or rut in the snow and plaintiff fell off the wagon and the wheels of same ran over his leg, breaking and fracturing it in three places. (Tr. 37/38.)

At the close of plaintiff's case defendant moved for a non-suit, which motion was denied by the court. (Tr. 88, 89.)

After both parties had introduced all of their evidence, the defendant moved the court to instruct the jury to return a verdict for the defendant, which motion the court overruled. (Tr. 140, 141.) The jury returned a verdict in favor of the plaintiff for the sum of $2,250.00, and judgment on the verdict was thereafter entered.

SPECIFICATIONS OF ERROR

I

The court erred in denying defendant's motion, after plaintiff and defendant had introduced all

their evidence in said cause, to instruct the jury to return a verdict for the defendant. (Tr. 140, 141.)

II

The court erred in giving to the jury the following instruction:

"If the jury find from the evidence that Frederickson had no authority to direct the plaintiff as to the manner in which he performed his work, then he was not a vice-principal, but he and the plaintiff were fellow-servants, and plaintiff cannot recover even though you should find that his injury was due in whole or in part to some negligent action of Frederickson. His right to recovery in this action is dependent upon his showing by fair preponderance of the evidence that he was subject to Frederickson's orders, and that Frederickson was responsible for the way in which the wagon was loaded, including the quantity of said load." (Tr. 146.)

III

The court erred in giving to the jury the following instruction:

"You are instructed that it is not sufficient to entitle the plaintiff to recover in this case to show a negligent breach of duty on the part of defendant corporation or its responsible agent, but it devolves upon the plaintiff to show further that such breach of duty was the proximate or immediate cause of his

injury. If the plaintiff in any important degree or way contributed to the accident he was guilty of what is known in law as contributory negligence. In such case the law disregards the negligence of the defendant and makes the negligence of the plaintiff a bar to his recovery. You have already been instructed that a servant entering into employment assumes all the natural risks and hazards of the work. In this case if you find that the accident was due to any unusual conditions you are to determine from all the evidence in the case whether or not plaintiff was so bound by the orders given him by Frederickson, if orders were given him, that he could not without disobeying orders so shape his conduct as to avoid the unusual risk. If he could have so acted in the emergency by the exercise of reasonable prudence and foresight such as may be expected of an ordinary man in a like situation, and failed to do so, he was guilty of contributory negligence and is not entitled to recover." (Tr. 146, 147.)

IV

The court erred in giving to the jury the following instruction:

"1. That plaintiff is entitled to recover if he has proven by a fair preponderance of the evidence that his injury was the result of an unusual risk which he assumed under the direct orders of a vice-principal of the defendant corporation, and that he was guilty of no contributory negligence which aided materially in producing the accident, that is, under

the circumstances he acted as might be expected of an ordinarily prudent and careful man in his situation.

"2. That plaintiff is not entitled to recover if you find: (a) that he was injured through an ordinary risk of the employment which risk he assumed when he entered the employment; (b) if he was injured through the act of a fellow-servant, that is the act of an employee who had no controlling authority over him in the circumstances; (c) if you find that his own negligence was an important contributing factor to the accident." (Tr. 147, 148.)

V

The court erred in refusing to give the jury the following instruction requested by defendant:

"You are instructed that the plaintiff's own testimony shows that he remained on the wagon to which he has testified at the time when the wagon was being loaded by the defendant's employee, Fred Frederickson, and when he had ample opportunity to remove himself to a place of safety. By so doing the plaintiff knowing, as he has pleaded, the condition of the streets of the town of Cordova, and particularly the condition of B Street in said town, assumed all of the risks incident to his remaining on said wagon and attempting to drive with it down said B Street, and the defendant is not liable for the injuries plaintiff thus suffered." (Tr. 155.)

ARGUMENT

The court should have granted defendant's motion for an instructed verdict for the following reasons:

1. The complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant, because the plaintiff in his complaint has failed to plead facts sufficient, if true, to show that Fred Frederickson was or acted as a vice-principal of the defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

2. The plaintiff has wholly failed to prove that said Frederickson was a vice-principal of defendant, or acted as vice-principal of defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains, but the evidence shows that said Frederickson at the time of said accident and prior thereto was and acted as a fellow servant of plaintiff.

3. The evidence further shows that if said Frederickson was guilt of any negligence, and that such negligence caused plaintiff's injury, it was the neg-

ligence of a fellow-servant and not that of a vice-principal of defendant.

4. The evidence clearly establishes the fact that the plaintiff by his conduct at and immediately before the time of the accident assumed the risk which resulted in and caused the injury complained of.

5. The evidence establishes beyond question the fact that the accident which caused the injuries complained of was brought about by the sole negligence of plaintiff.

We will discuss together the first three reasons assigned why defendant's motion for an instructed verdict should have been granted.

It is admitted that the fellow-servant rule of the common law, as construed and expounded by the Supreme Court of the United States and the other Federal courts, must be followed in determining whether or not plaintiff and Frederickson were fellow-servants in the employ of defendant at the time of the accident which caused plaintiff's injuries. The fellow-servant rule of the common law which had theretofore been announced and adopted by the Supreme Court of the United States was declared to be the law in Alaska governing the rela-

tionship between master and servant, in *Alaska Treadwell Gold Mining Company v. Whelan*, 168 U. S. 86, 18 Sup. Ct. Reporter 40. In that case the court, among other things, said:

"This was an action brought in the district court of the United States for the district of Alaska against a mining corporation by a workman in its employ. The complaint alleged: 'That on November 23, 1891, and for nearly six months prior thereto this plaintiff was in the employ of said defendant, as a workman in the mine of said defendant, in breaking and preparing rock for the chutes, and doing other work, as ordered by the foreman of said defendant, one Samuel Finley, under whom this plaintiff worked, and from whom he received his orders; that on November 23, 1891, while this plaintiff was yet in the employ of said defendant, he was ordered by the foreman of said defendant company to break rock immediately above and over one of the chutes of the defendant company; that, in compliance with the orders of the foreman of said defendant, and as became his duty so to do, the plaintiff proceeded to his place immediately above and over said chute, and commenced to break said rock, as he had been ordered so to do; and that, while so engaged, and carefully and skillfully and without negligence performing his duties, as aforesaid, and without the knowledge of this plaintiff, and carelessly and negligently the foreman of said defendant drew or caused to be drawn, the gate at the mouth of said chute over which this plaintiff was working,

thereby causing the rock at the head of said chute to be suddenly drawn in, carrying this plaintiff with it, through said chute, a distance of about 30 feet, and completely covering him with great quantities of rock and debris,' thereby greatly injuring him.

"At the trial, the plaintiff, being called as a witness in his own behalf, gave evidence tending to support the allegations in the complaint, and testified that on the night of November 23, 1891, he was sent by Samuel Finley, the boss in the pit, to the top of a chute, there to break rock and pound it fine enough to go through the chute, which connected with the tunnel through which the rock was shot into cars to be taken to the mill; that at the bottom of the chute was a gate, always closed until the chute was filled, and orders given to draw it; that Finley's custom was to come upon the top of the chute, to see if the rock was broken fine enough, and, if it was all right, to tell the men to come down, as he was going to draw; and that at the time in question, after putting the plaintiff and others to work at the chute, he never gave them any notice that he was going to draw. . . . . .

"The evidence introduced at the trial, giving it the utmost possible effect in favor of the plaintiff, was insufficient to support a verdict for him, and the defendant's request, made at the close of the whole evidence, to instruct the jury to return a verdict for the defendant, because Finley, whose negligence was the ground of the action, was a fellow servant of the plaintiff, should have been granted.

"Finley was not a vice-principal or representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow-servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery, or in giving orders to the men.

"The case is governed by a series of recent decisions of this court, undistinguishable in their facts from this one: Railroad Co. v. Keegan, 160 U. S. 259, 15 Sup. Ct. 269; Railroad Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848; Railroad Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843; Martin v. Railroad Co., 166 U. S. 399, 17 Sup. Ct. 603. See, also, Wilson v. Merry, L. R. 1 H. L. Sec. 326."

The fellow-servant rule, as adopted and applied in Alaska by the supreme court in the *Whelan* case has never been abrogated or modified either by an act of congress or of the local legislature of the Territory of Alaska, as to the character of industry

in which plaintiff and Frederickson were engaged at the time of plaintiff's injury. In the absence of a statute to the contrary, the rule laid down in the Whelan case has never been annulled or modified by the supreme court, but has been consistently followed and approved by that court and all other federal courts in cases involving the question of fellow-servants.

The opinion in the Whelan case has been cited with approval by this court. It has been followed and the doctrine it announces approved in the following cases:

Gaynon v. Durkee, 87 Fed. 302 at 304.

The Miami, 87 Fed. 757 at 760.

Grady v. Southern R. R. Co., 92 Fed. 491 at 493; (Sixth Circuit, opinion by present Chief Justice Taft).

Wood v. Potlatch Lumber Co., 213 Fed. 591 at 593, (Ninth Circuit).

Union Pacific R. R. Co. v. Marone, 246 Fed. 916 at 919, (Eighth Circuit).

James Stewart & Co. v. Newby, 266 Fed. 287 at 293, (Fourth Circuit).

Southern Bell Telephone & Telegraph Co. v. Richardson, 284 Fed. 124 at 126, (Fifth Circuit).

Andre v. Winslow Bros. Elevator Co., 76 N. W. 86 at 87.

Texas & Pacific R. R. Co. v. Bourman, 212 U. S. 536, 29 Sup. Ct. 319 at 320.

In the case last cited, the supreme court, through Mr. Justice Moody, said:

"The presiding judge refused to instruct the jury as requested by the defendant, that the engineer and the section foreman were, respectively, fellow-servants of the plaintiff, and that, if the injury occurred through the negligence of either, the plaintiff was not entitled to recover. We think these instructions should have been given. Both the engineer and the section foreman were fellow-servants of the plaintiff; and, if the plaintiff's injury was caused by the negligence of either, the law, as it many times has been declared by this court, will not permit a recovery."

And the court cites numerous authorities, including the Whelan case, to sustain the doctrine announced.

In *Wood v. Potlatch Lumber Co.*, 213 Fed. page 591 Supra, the court said, at page 593:

"But the contention most vigorously pressed by the plaintiff is that the case is not one for the application of the fellow-servant doctrine. It is urged in that behalf that the accident was due to the failure on the part of the master to provide a rea-

sonably safe place to work, a default the responsibility for which the master cannot shift. It is not suggested that the premises were defective or unsafe immediately before or immediately after the accident, or that there was any danger other than from the falling timbers, and it is, of course, conceded that the timbers fell, not by accident, but as the result only of Fennell's willful act. Fennell's intelligence and general competency are not called into question, and the defendant had no reason to anticipate that he would take such a reckless course. Admittedly the timbers could have been carried back in the same manner in which they were brought up, or, for that matter, they could have been safely thrown to the ground at the very place where the accident occurred. If, under such circumstances, the negligence of the servant is chargeable to the master, the cases would indeed be rare where the latter could escape liability."

In *Union Pac. R. Co. v. Marone*, 246 Federal, 916 supra, the court said at page 919:

"Negligence is a breach of duty, and where there is no duty or no breach thereof there is no negligence. The duty of the master is one of provision. The duty of the servant is one of operation, and neither is liable for the negligence of the other. It is the duty of the master to exercise reasonable care to provide a reasonably safe place in which, and reasonably safe machinery or appliances with which, the servants may do the work assigned to them, and for causal negligence in the discharge of

this duty the master is liable and the servants are not. It is the duty of the servants to exercise reasonable care so to use the place, machinery, and appliances furnished, so to conduct the operations intrusted to them, as to protect themselves from risk, danger, and injury, and for a breach of this duty the servants are liable and the master is not. Where the place in which the servant is required to work, or the machinery or appliances with which he is required to work, or the method of doing the work, is made or becomes dangerous and results in injury only because of the negligence of the injured employe, or because of the negligence of his fellow-servants, or because of the concurring negligence of both, the master is not liable, for such negligence is a breach of the duty of operation and not a breach of the duty of provision."

The acts of Frederickson which plaintiff claims caused the accident resulting in his injury were acts of operation and not of provision. Plaintiff testified (Tr. 62) that Frederickson shoved the cases onto the footboard, and he (plaintiff) put them on the seat. It is obvious that the plaintiff and Frederickson were merely co-operators in loading the wagon. It is not claimed that the wagon was unsafe or that the horse was not gentle, or that either was unfitted or inadequate for the purposes for which they were being used by plaintiff.

In *James Stewart & Co. v. Newby*, 266 Fed. 287 supra, the court said, at 293 and 294:

"Prima facie all servants in the common employ of a single master are fellow-servants. So it has generally been held that a gang foreman in charge of a squad of ordinary laborers is a fellow-servant with them, and not a vice-principal of the master.

"As applicable to the facts of the decided cases, the conclusions reached in this respect have generally been correct. In some instances, however, the language employed has been misleading, and there is considerable apparent conflict and occasionally some real conflict in the decisions. In some instances the language employed would indicate that gang foremen are fellow-servants with their subordinates, irrespective of the scope of their duty. In others the issue has been determined upon the basis of the foreman's right or the absence of his right to employ and discharge. The real test is whether the master has intrusted to such one the limited duty of mere operation on the one hand, or a broader duty involving provision on the other. When one is charged with a non-delegable duty of a master, liability for his negligence thereof exists, if injury is thereby caused to another servant of any rank whatever, superior, equal or inferior. Since, however, all who enter a common employment are *prima facie* fellow-servants, in order to render the master liable specific testimony must be produced to show that the offending servant is

charged with some duty of provision, and not merely the ordinary service of operation."

This court, in *Consolidated Interstate-Callahan Mining Co. v. Witkouski*, 249 Fed. 833 at 836, said:

"It has come to be the settled rule of law also, of the supreme court, that the test as to whether one servant is a fellow-servant of another is not the particular rank he sustains to that other in the service, but the specific character of the act performed."

We submit that the complaint in the instant case does not plead or show that Frederickson was a vice-principal of defendant, and under the rule announced in the cases cited, it devolves on the plaintiff to plead and prove that the person whose negligence caused his injuries was, at the time of such injuries, a vice-principal of defendant. Otherwise the law presumes such person was a fellow-servant of plaintiff.

In paragraph II of plaintiff's complaint (Tr. 3 and 4), plaintiff alleges:

"That on the 4th day of May, 1922, and for some time previous to said date, Fred Frederickson was in charge of the warehouse of defendant corporation, and was authorized by defendant to superintend the shipment of all goods from said warehouse

and to exercise authority for and on behalf of defandant corporation over the employees of said defendant corporation working in said warehouse and over those delivering goods from said warehouse."

There is no allegation in the complaint to the effect that Frederickson was authorized or employed by defendant to exercise any authority over plaintiff as to the manner of loading the wagon or as to the size of the load plaintiff should haul on the wagon. Frederickson was authorized by defendant to determine what goods should be taken from the warehouse by the deliveryman, and such determination of Frederickson was based upon orders received from defendant's store or some few customers who obtained goods from the warehouse, but such was the extent of Frederickson's authority over plaintiff. (Tr. 102.)

The complaint does not even inferentially allege that Frederickson was authorized to control plaintiff's judgment in reference to the load that could or should be carried on the wagon.

The evidence shows that the defendant was at all times mentioned in the complaint engaged in the retail mercantile business at Cordova, Alaska. That

it operated a general retail store at that place. That the only purpose of maintaining a warehouse was to store therein goods, wares and merchandise so as to enable it to supply its retail store, as the storage room in the latter was inadequate to supply space for all the goods, wares and merchandise which defendant desired to carry in stock at Cordova. (Tr. 96.) O'Neill was vice-president and general manager of the defendant corporation at all times since its incorporation. (Tr. 90.) Frederickson was warehouseman at and prior to the time of plaintiff's injuries (Tr. 90) and as such warehouseman he merely had charge of the warehouse and the goods, wares and merchandise therein contained. He had no authority over any employee of defendant and was not empowered to hire or discharge them. (Tr. 93 and 94.) The business of the defendant was not so extensive or varied as to require different departments for its successful operation. It had only one manager, Mr. O'Neill, who had entire charge of all its business activities and operations, and kept at all times in close touch with the warehouse. (Tr. 90, 91, 92, 93.)

In *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Reporter 914, the court said:

"And it is only carrying the same principle a little further, and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employes under them, vice-principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. . . . . .

"The truth is, the various employes of one of these large corporations are not graded like steps in a staircase, those on each step being as to those on the step below in the relation of masters, and not of fellow-servants, and only those on the same steps fellow-servants, because not subject to any control by one over the other. *Prima facie*, all who enter into the employ of a single master are engaged in a common service, and are fellow-servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow-servants. All enter into the service of the same master, to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employes, and that risk, which he knows exists, he assumes in entering into the employment."

Plaintiff cannot successfully insist that Frederickson was in charge of any independent department of defendant's business operations. He exercised no discretion whatever in reference to the performance of his duties as warehouseman, but was at all times subject to the orders and directions of the defendant's general manager O'Neill, who had direct supervisory control over the warehouse and the duties of Frederickson as warehouseman. (Tr. 93.) Plaintiff had control of defendant's horse and wagon, which he drove subject to the orders of O'Neill, yet no one would seriously contend that plaintiff was in charge of any independent department of defendant's business.

The Supreme Court of the State of Oregon, in *Mast v. Kern*, 54 Pac. 950, at 951, said:

"On the other hand, the rule, and the one now unquestionably established and supported by the great weight of authority both in this country and in England, is that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not the grade or rank of the negligent employe. If the act is one pertaining to the duty the master owes to his servant, he is responsible for the manner of its performance, without regard to the rank of the

servant or employe to whom it is intrusted; but, if it is one pertaining only to the duty of an operative, the employe performing it is a fellow-servant with his co-laborers, whatever his rank, for whose negligence the master is not liable."

Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. Reporter 848.

Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. Reporter 983.

Martin v. Atchison T. & S. F. R. Co., 166 U. S. 399, 17 Sup. Ct. Reporter 603.

Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. Reporter 843.

New England R. R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. Reporter 85.

Beutler, Admr. v. Grand Trunk Junction R. R. Co., 224 U. S. 85, 32 Sup. Ct. Reporter 402.

Weeks v. Scharer, 111 Fed. 330.

Christ v. Wichita Gas Electric P. & P. Co., 83 Pac. 199.

Larsen v. LeDoux, 81 Pac. 600.

Hussy v. Coger, 20 N. E. 556.

Ell v. Northern Pac. R. Co., 48 N. W. 222.

Deep Mining & Drainage Co. v. Fitzgerald, 43 Pac. 210.

Andre v. Winslow Bros. Elevator Co., 76 N. W. 86.

The trial court in its opinion overruling defendant's motion for a new trial (Tr. 181 to 197), at pages 186 and 187 said:

"The Whelan case, the Martin case and the Peterson case, and other similar cases so strongly relied on by counsel, were all decided in the last decade of the nineteenth century, when the supreme court, as then constituted, overruled repeated decisions made by the same court. Many of the federal and state courts made similar decisions in that decade and the one following, using the supreme court decisions as authorities. It is true that none of those cases has been expressly overruled but the supreme court itself in the last decade and a half has made repeated decisions so utterly inconsistent with those cited that the action of the court amounts to overruling the earlier ones. The most decisive case is the one already quoted, that of Kreigh v. Westinghouse. The opinion by Mr. Justice Day contains statements which amount to a denial in argument of the position taken by the court in the cited cases."

We submit that the Whelan, Martin and Peterson cases have never been overruled by the Supreme Court of the United States, but have been followed by that court and this court, except in jurisdictions where the fellow-servant rule adopted and applied in those cases has been annulled or modified by statute. This court cited the Whelan case with

approval as late as 1914, in *Wood v. Potlatch Lumber Co.*, 213 Fed. 591 supra, and the Supreme Court of the United States approved and followed the Whelan case in *Texas & A. P. R. Co. v. Bourman*, 212 U. S. 536, 29 Sup. Ct. Reporter 319 (decided in 1914, the same year as that court decided the Kreigh case).

In *Beutler, Admr., v. Grand Trunk Junction R. R. Co.*, 224 U. S. 85, 32 Sup. Ct. Reporter 402, the Supreme Court of the United States, speaking through Mr. Justice Holmes, said:

"The doctrine as to fellow servants may be, as it has been called, a bad exception to a bad rule, but it is established, and it is not open to courts to do away with it upon their personal notions of what is expedient. So it has been decided that in cases tried in the United States courts we must follow our own understanding of the common law when no settled rule of property intervenes . . . . . but whether certain facts do or do not constitute a ground of liability is in its nature a question of law. To leave it uncertain is to leave the law uncertain. If the law is bad, the legislature, not juries, must make a change. We answer the certificate, Yes."

The United States Circuit Court of Appeals for the fifth circuit, in an opinion rendered in 1922 in *Southern Bell Telephone & Telegraph Co. v. Rich-*

ardson, 284 Fed. 124, cited and followed the doctrine laid down in the Whelan and other cases.

The supreme court said, in *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. 249, 29 Sup. Ct. 619, the case which the trial court seemed to think annulled or modified the fellow-servant rule laid down in the Whelan and other cases:

"The employe is not obliged to examine into the employer's methods of transacting his business, and he may assume, in the absence of notice to the contrary, that reasonable care will be used in furnishing appliances necessary to carrying on the business. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 68, 48 L. Ed. 96, 100, 24 Sup. Ct. Rep. 24. But while this duty is imposed upon the master, and he cannot delegate it to another and escape liability on his part, nevertheless, the master is not held responsible for injuries resulting from the place becoming unsafe through the negligence of the workmen in the manner of carrying on the work, where he, the master, has discharged his primary duty of providing a reasonably safe appliance and place for his employes to carry on the work, nor is he obliged to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant and his fellow-workmen."

The court in the Kreigh case reversed the judgment of the trial court, because there was evidence

to establish the unsafe character of the place where the plaintiff was required to work, and for that reason the supreme court held the case should have been submitted to the jury, but the court did not question the soundness of the fellow-servant rule laid down in the Whelan and other cases.

In *Olson v. Oregon Coal & Navigation Co.*, 104 Fed. 574, this court, speaking through Judge Ross, at page 576, said:

"It is very clear that upon common-law principles the owner would not be liable for an injury sustained by one of such employes by reason of the negligence of one of his co-employes, whatever his grade in the common employment. In the recent case of Railroad Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, Adv. S. U. S. 85, 44 L. Ed. 181, where the case of Railroad Co. v. Ross, 112 U. S. 377, 5 Sup Ct. 184, 28 L. Ed. 787, was finally and squarely overruled, the supreme court announces the true rule to be, both upon principle and authority, 'that the employer is not liable for an injury to one employe occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exemption if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes; or, in other

words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end.' It is true that the present case is to be determined, not by the common law, but by the rules of the maritime law; but that law, as was shown very clearly, we think, by Judge Brown in the case of The City of Alexandria, supra, is, in respect to the facts here presented, the same."

The Westport, 136 Federal 391.

The C. S. Holmes, 220 Fed| 273.

The Rosalie Mahoney, 218 Fed. 695.

Western Fuel v. Garcia, 260 Fed. 839.

The evidence for the plaintiff and the uncontradicted evidence of the defendant shows conclusively that Frederickson and plaintiff were fellow-servants at the time of the accident, and there was therefore no question of fact to be submitted to the jury.

Alaska Treadwell Gold Mining Co. v. Whelan, 168 U. S. 86, 18 Sup Ct. 40, supra;

Union Pac. R. Co. v. Marone, 246 Fed. 916.

James Stewart & Co. v. Newby, 266 Fed. 287.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914.

With reference to the fourth reason assigned why defendant's motion for an instructed verdict should

have been granted, we submit the danger from overloading the wagon, which plaintiff claims caused the accident occasioning his injuries, was as apparent to him as it could have been to defendant. Plaintiff was familiar with the condition of the streets of Cordova. He had been in the employ of defendant as deliveryman for many months prior to the 4th of May, 1922. He had driven the same horse and loaded wagon over the same street where the accident occurred on the morning of May 4th, 1922, and almost immediately prior to the accident. He was an experienced horseman and deliveryman. The possibility or probability of the cases of milk and butter which he placed on the seat falling and striking the horse was as obvious to him as it could have been to the defendant. The plaintiff had ample time and opportunity to leave the alleged dangerous position he occupied on the wagon after the time Frederickson began placing the cases of milk and butter on the footboard, and before the horse started down the hill. (Tr. 70, 71.)

Plaintiff testified that Frederickson said to him that if he (plaintiff) did not take the cases of milk and butter he would have to quit (Tr. 36 and 70); but such threat, even if made by Frederickson, did not justify plaintiff in continuing to occupy an ob-

viously dangerous position, when there was no promise by Frederickson or by any other person representing defendant to remove the danger or to make plaintiff's position or the place he was required to occupy in order to perform his work more safe in the future.

In *Union Pac. R. Co. v. Marone*, 246 Fed. 916, at 924, the court, through Judge Sanborn, said:

"A servant assumes the ordinary risks and dangers of his employment and the extraordinary risks and dangers which he knows and appreciates. Neither the order of a vice-principal to the servant to work in a dangerous place, or in a dangerous way, nor his assurance of the servant's safety, nor the servant's fear of losing his job, will release the servant from his assumption of the risk and danger where they were readily observable and were known and appreciated by him, unless the vice-principal makes a promise to remove them as an inducement for the servant's continuance in the service."

And the court cites numerous authorities to sustain the doctrine announced.

In the consideration of the fifth and last reason assigned why the court should have granted the defendant's motion for an instructed verdict, we insist the plaintiff's testimony shows that his injuries were caused by his own negligence. He tes-

tified that the wagon dropped into a hole or rut in the snow, and that he and a case of milk fell on the side in the bank, and he slid under the wagon, and the wagon wheel ran over his leg. (Tr. 37.) He didn't state that he could not have avoided the hole or rut, nor did he state that he did not see the hole or rut, or that he did not know of its presence. He was familiar with that part of the street, and had passed over it on the same morning prior to the accident. He did not testify that the horse became unmanageable on account of the case of milk slipping from the wagon and striking the horse; nor did he testify that he was unable to control the horse because he was compelled to put one of his hands on the two cases of milk; nor did he testify that he was unable to control the horse for any other reason. He did testify that he fell from the wagon when it dropped into a hole or rut in the snow. The evidence, read in the most favorable light for the plaintiff, does not show that the extra cases of milk and butter which Frederickson placed on the footboard of the wagon caused the accident which resulted in plaintiff's injuries. Plaintiff testified that Frederickson put the cases of milk and butter on the footboard and he (plaintiff) placed them on the seat. (Tr. 62, 64.) The case of milk or butter

which fell from the wagon and struck the horse evidently fell from the seat where it had been placed by the plaintiff. Plaintiff testified as follows (Tr. 69):

"I told him the wagon was loaded and there was no more could get on—if he found room to put them on."

Evidently the plaintiff did not think the extra cases which he says Frederickson insisted on placing on the wagon would render his position dangerous or perilous; in any event, he was willing to take the risk, and if the placing of the extra cases on the wagon constituted negligence, plaintiff's acquiescence, assistance and participation in such act rendered him plainly guilty of contributory negligence. There is no allegation in the complaint, nor is there any evidence in the record, that the wagon was in any manner defective or unsafe, nor is there any allegation in the complaint, or evidence in the record that the horse used by the plaintiff at the time of the accident was unmanageable, excitable, or that such horse was in any respect unfit for the purpose for which he was being used. Defendant relies solely in this action on the alleged negligence of Frederickson in insisting on the plaintiff carrying on the wagon the extra cases of milk and butter

which plaintiff says Frederickson placed on the footboard, and he (plaintiff) placed on the seat beside him. It is apparent, if there was any negligence in such action, as before stated in this brief, it was the negligence of a fellow-servant, and that the plaintiff was guilty of contributory negligence on account of his participation in the act which he claims caused the accident.

Musser-Sauntry Land, Logging & Mfg. Co. v. Brown, 126 Fed. 141.

St Louis Cordage Co. v. Miller, 126 Fed. 495.

McAdoo v. Angellott, 271 Fed. 268.

Maki v. Union Pac. Coal Co., 187 Fed. 389.

Chicago, B. & Q. R. Co. v. Shalstrom, 195 Fed. 725.

Bunt v. Sierra Butte Gold Mining Co., 138 U. S. 483, 11 Sup. Ct. 464.

The Westport, 136 Fed. 391.

Lamson v. American Ax & Tool Co., 58 N. E. 585.

Mast v. Kern, 54 Pac. 950.

The second fifth specification of error avers that the court erred in giving to the jury the second paragraph of Instruction No. 5. (Tr. 146.) Defendant timely excepted to such instruction. (Tr. 151 and 152.) By that instruction the court told the jury

that if Frederickson had no authority to direct the plaintiff as to the manner in which the latter performed his work, then Frederickson was not a vice-principal of the defendant, but plaintiff and Frederickson were fellow-servants. From such instruction the jury must have inferred that if Frederickson had any authority, no matter how limited, to direct the plaintiff as to the manner in which he performed his work, Frederickson was a vice-principal of defendant. Unless the instruction warrants such an inference, we submit it is purposeless and meaningless, so far as guiding the jury in the performance of their duties as jurors. But the latter part of the instruction shows that the court must have intended to advise the jury that if Frederickson had any authority to direct plaintiff as to the manner in which the latter performed his work, then Frederickson was a vice-principal, because the court says in that part of the instruction that plaintiff's right to recover depended on his showing, first, that he was subject to Frederickson's order, and, second, that Frederickson was responsible for the way in which the wagon was loaded, including the quantity of said load.

If such be the law, then every foreman, no matter how limited his authority may be, is a vice-

principal, since every foreman has some authority to direct the men in the performance of the work that he and they have been employed to accomplish. If he had no authority or control over the men in the prosecution of such work, he would not be a foreman. One might be a foreman over only a few men, and might be doing the same kind and character of work as those under him, and yet might be responsible to the master or the master's representative for the manner in which the work was performed. But such power of direction of the men under him, and such responsibility to the master for the character of the work performed would not of themselves make him a vice-principal of the master. A vice-principal is one who directly represents the master in some matter of provision, because it is the duty of the master to provide and the duty of the servant to operate. A mere foreman of a gang of men, who, with them, is engaged in operative work, is not a vice-principal, but according to the instruction criticized, such a foreman would be a vice-principal.

In *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, the court said:

"No testimony was offered by the defendant, and at the close of plaintiff's testimony the defendant

asked the court to direct a nonsuit, which motion was overruled, to which ruling an exception was duly taken. In its charge to the jury the court gave this instruction: 'If the injury results from negligence or carelessness on the part of one so placed in authority over the employe of the company, who is injured, as to direct and control that employe, then the company is liable.' . . . . .

". . . . Prima facie, all who enter into the employ of a single master are engaged in a common service, and are fellow servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow servants."

In *James Stewart & Co. v. Newby*, 266 Fed. 287, at page 294, the court said:

"The basic fact of all liability of the master is the servant's agency. He acts as it were by power of attorney. If the power is special and limited, the master's liability is limited accordingly; if broad and general, his liability is naturally extended. If the supervision is of such character as to charge the foreman with the duty of inspection, his knowledge becomes the knowledge of the master, and entails an immediate liability which does not pertain to servants of lower order not so charged. The foreman may be charged with the duty of maintenance or repair, in which case, both his knowledge and his duty become the knowledge and duty of the master, so as to require him, not only to exercise reasonable diligence to discover, but also to provide against danger. On the other hand, the

servant not charged with such duty has a right to rely upon the master's fulfillment of his obligation. He need not anticipate that the master will be negligent; the law's requirement is an assurance to him that the master has done his duty. Whether the foreman is charged with a nondelegable duty of the master, in a particular case, as above stated, is a question of fact to be determined from all the evidence. If there is no testimony to show such fact, the court should charge, as a matter of law, that the foreman is a fellow servant, because the mere fact that he is a foreman is not sufficient."

Union Pac. R. Co. v. Marone, 246 Fed. 916.

Alaska Treadwell Gold Mining Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40.

Nor. Pac. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848.

Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983.

Northern Pac. R. Co. v. Dixon, 194 U. S. 338, 24 Sup. Ct. 683.

Martin v. R. R. Co., 166 U. S. 399, 17 Sup. Ct. 603.

Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843.

New England R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85.

Wood v. Potlatch Lumber Co., 213 Fed. 591.

Olson v. Coal Navigation Co., 104 Fed. 574.

The Westport, 136 Fed. 391.

In specification of error No. III we criticise instruction No. 6. (Tr. 146 and 147.) Timely exception was taken to the instruction by the defendant. (Tr. 152.) We submit instruction No. 6 is eroneous, because it assumes that Frederickson was a vice-principal of the defendant, since it impliedly advises the jury that plaintiff was bound to obey Frederickson's orders, and if such obedience resulted in plaintiff's injuries, defendant would be liable therefor. If Frederickson were a vice-principal of defendant, and as such vice-principal gave certain orders to plaintiff, and the latter obeyed such orders and sustained injury on account of such obedience, through no fault or negligence of his own, and the danger incident to the execution of such orders was latent and not apparent to plaintiff, then plaintiff would be entitled to recover from defendant. But if Frederickson were a fellow-servant of plaintiff, as we contend the evidence clearly shows, then the plaintiff is not entitled to recover, even though he received orders from Frederickson, the execution of which caused his injuries, regardless of whether or not the plaintiff was guilty of negligence himself. In other words, if Frederickson was a fellow-servant of plaintiff at the time of the accident, and his negli-

gence occasioned plaintiff's injuries, defendant is not liable, even though plaintiff was free from negligence.

We wish to refer the court to all of the authorities cited to sustain our objections to and criticism of instruction No. 5. It cannot be successfully contended that instructions Nos. 5 and 6 referred to were satisfactorily explained by other instructions to the jury. It is true the court did, in instruction No. 3 (Tr. 144 and 145) define a vice-principal, and, we think, correctly so. The court in that instruction did say that because one is superior in grade, rank or authority to another does not make him any more the representative of the master than the one lower in position. But nowhere in the court's instructions does the court say that only a vice-principal may give orders to a servant. The trial judge, in the opinion overruling defendant's motion for a new trial (Tr. 196) said:

"Defendant criticises the second paragraph in the court's instructions, No. 5, saying, 'That the court assumes that if Frederickson had any authority to direct the plaintiff as to the manner in which the plaintiff performed his work then Frederickson was a vice-principal of defendant.' It is difficult to read that meaning from this instruction. The instruction is that plaintiff's right to

recover was dependent upon his showing that he was subject to Frederickson's orders and that Frederickson was responsible for the way the wagon was loaded, including the quantity of said load. The whole must be read together and the meaning is plain that if he was subject to Frederickson's orders in the matter of loading the wagon then the corporation would be liable if Frederickson was guilty of negligence which places plaintiff in an unnecessarily dangerous position. All this is made plain by the other instructions, and courts have decided so often that instructions must be taken as a whole and that if one instruction is obscure but is explained by others there is no error, it seems hardly necessary to argue this matter any further."

The court's explanation of instruction No. 5 conclusively shows that the court intended to and did instruct the jury that plaintiff's right to recover was dependent, first, upon his showing that he was subject to Frederickson's orders, and, second, that the latter was responsible for the way the wagon was loaded, including the quantity of said load. The only conclusion the jury could reach from such instructions is that if plaintiff established those two propositions by a preponderance of evidence, he would be entitled to recover judgment against defendant. We content that it was necessary for plaintiff to prove another and additional vital fact

before he could establish defendant's liability, and that is, that Frederickson was a vice-principal of the defendant when he gave such orders. Prima facie, all servants in the common employ of a single master are fellow-servants. In the second paragraph of instruction No. 5, and in instruction No. 6 (Tr. 146, 147), specifications of error Nos. II and III, the jury were impliedly told by the court that if plaintiff were subject to Frederickson's orders, and Frederickson was responsible for the way in which the wagon was loaded, including the quantity of its load, Frederickson was a vice-principal of defendant, because if Frederickson was not acting in the capacity of a vice-principal in ordering plaintiff to take the extra cases of milk and butter, defendant could not be liable for the result of the execution of such order. Even if there were in the record evidence tending to show that Frederickson was a vice-principal of defendant, such alleged evidence was contradicted by the evidence on behalf of defendant. Assuming but not admitting, therefore, that the court rightfully denied defendant's motion, for an instructed verdict, he should have instructed the jury to determine from the evidence whether or not Frederickson was acting in the capacity of a vice-principal of

defendant when he ordered plaintiff to overload the wagon, as plaintiff claims, if the jury should find that he gave such orders.

The court, in instruction No. 5, specification of error No. II, assumed that the conferring of authority on Frederickson by defendant to direct plaintiff as to the size of the load to be carried on the wagon, and the manner in which the wagon should be loaded, made Frederickson a vice-principal of defendant. If that instruction correctly states the law, then any servant who has any authority, no matter how limited, to direct any other servant of the same master with reference to any kind or character of work, is a vice-principal of the master. Every foreman, therefore, regardless of the extent of his authority or the number of men to whom he is empowered to give orders, is a vice-principal. We submit the doctrine announced in that instruction is contrary to every decision of the Supreme Court of the United States and of this court, where the common-law fellow-servant rule has been expounded and determined.

Paragraph 1 of instruction No. 7 (Tr. 147), specification of error No. IV, is erroneous because there is no evidence in the record to warrant the jury in find-

ing that Frederickson was a vice-principal, since the uncontradicted testimony of O'Neill and Frederickson (Tr. 90, 91, 92, 93, 94, 102, 110, 111, 112, 113 and 119) shows that Frederickson and plaintiff were fellow-servants at the time of the accident. Timely exception was also taken to said instruction No. 7. (Tr. 153 and 154.) We wish to call the court's attention to the authorities cited in support of our objection to instruction No. 5.

Sub-division (b) of paragraph 2 of instruction No. 7 (Tr. 148), specification of error No. IV, wherein the court said to the jury: "If he was injured through the act of a fellow-servant, that is the act of an employe who had no controlling authority over him in the circumstances," is erroneous. It is a summary statement of the law given by the court to the jury, covering the relations of master and servant, and purports to be a definition of what a fellow-servant is. It in effect tells the jury that Frederickson was not a fellow-servant of the plaintiff, if Frederickson had any controlling authority over plaintiff. The instruction is vague and misleading as to the words "controlling authority," and the jury might well have taken such words to mean any authority to direct the plaintiff in any manner as to the performance of his work. Such is not the

law governing the evidence in this case, nor is it the law with reference to the relations of master and servant. Timely exception was taken to said instruction. (Tr. 154.) The authorities cited to sustain our objections to and criticism of instruction No. 5 are equally applicable in support of our objections to and criticism of this portion of instruction No. 7.

The court erred in refusing to give to the jury defendant's requested instruction No. 2 (Tr. 155), specification of error No. V, because the plaintiff's own testimony shows that he had ample time and opportunity to leave the wagon while Frederickson was placing the extra cases of milk and butter on the footboard of the wagon, which act on the part of Frederickson plaintiff claims caused the accident resulting in his injuries. (Tr. 53, 62, 64 and 69.)

Plaintiff knew the capacity of the wagon; he knew the character of the horse he was driving; he was thoroughly familiar with the street he was about to travel over; he had wide experience as a deliveryman in the town of Cordova, where the accident occurred; no promise was made to him by any vice-principal of defendant or even by Frederickson that he would not be required to overload the wagon in the future. The peril he was about

to assume, therefore, was as apparent to him as it could have been to Frederickson or anyone else. If he did not wish to assume such risk he should have left the wagon and refused to continue working for defendant in the capacity of a deliveryman.

In *Union Pac. R. Co. v. Marone*, 246 Fed. 916, at page 924, the court said:

"A servant asumes the ordinary risks and dangers of his employment and the extraordinary risks and dangers which he knows and appreciates. Neither the order of a vice-principal to the servant to work in a dangerous place, or in a dangerous way, nor his assurance of the servant's safety, *nor the servant's fear of losing his job*, will release the servant from his assumption of the risk and danger where they were readily observable and were known and appreciated by him, unless the vice-principal makes a promise to remove them as an inducement for the servant's continuance in service."

And the court cites numerous authorities to sustain the doctrine announced.

American Car & Foundry Co. v. Allen, 264 Fed. 647.

Washington Terminal Co. v. Sampson, 289 Fed. 577.

Chicago, B. & Q. R. Co. v. Shalstrom, 195 Fed. 725.

Ford Motor Co. v. Casey, 252 Fed. 120.

Butler v. Frazee, 211 U. S. 459, 29 Sup. Ct. 136.

We insist that defendant was entitled to a judgment, notwithstanding the verdict of the jury, because the complaint and the evidence conclusively show that plaintiff and Frederickson were fellow-servants at the time of the accident, and even if Frederickson's negligence occasioned plaintiff's injuries, the defendant is not liable therefor.

We have accepted as true plaintiff's testimony regarding Frederickson's orders and conduct. Frederickson denies that he ordered plaintiff to take the extra cases of milk and butter, but that he (Frederickson) told plaintiff that his load was large enough without taking on any more, but that plaintiff said he could take one case more, and that plaintiff did take another case and place it on the seat of the wagon. (Tr. 117, 118.) But for the purpose of determining whether or not defendant's motion for an instructed verdict in favor of defendant should have been granted, plaintiff's testimony as to Frederickson's orders and conduct immediately prior to the accident must be taken as true, our contention being that, conceding the verity of all of the evidence in the record favorable to

plaintiff, the same is not sufficient to warrant the court in submitting the case to the jury, and the court should have instructed a verdict for the defendant, in accordance with the latter's request, after all of the evidence on both sides had been submitted.

We respectfully submit that the judgment of the trial court should be reversed, with a direction to that court to dismiss the action, or in any event to grant a new trial.

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